SUPREME COURT, U. S.

MAY 6 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1306

WILLIAM F. SCANLAN,
Petitioner,

vs.

ANHEUSER-BUSCH, INC., a corporation, et al.,
Respondents.

Brief in Opposition to Petition for Certiorari

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PRELIMINARY

Petitioner has rebound a condensed, but largely verbatim,* version of his 89-page Opening Brief in the Court of Appeals, restyled it as a "Petition For Writ of Certiorari," and filed it with the clerk of this Court. Even affording the petition a most liberal construction it can hardly be

Emphasis is supplied throughout, unless otherwise noted.

*Except for the first paragraph on page 2 and the writing under headings IV (Pet. 13-17) VII and VIII (Pet. 51-57), the balance of the petition is practically a copy of Appellant's Opening Brief in the United States Court of Appeals for the Ninth Circuit.

made to fill the office of a petition for certiorari. It suggests none of the "special and important reasons" for granting a writ to review a decision of a court of appeals which are set forth in Rule 19(1)(b) of Revised Rules of this court. It does not contain, in any order, the matters required to be set forth in Rule 23, subdivisions, 1(a), 1(b)(i), 1(b)(ii), 1(c), 1(d), 1(h) and 1(i). It seems manifest that it fails "to present with *accuracy, brevity* and *clearness* whatever is essential to a ready and adequate understanding of the points requiring consideration" by this Court. In these circumstances, certiorari may be summarily denied pursuant to subdivision 4 of Rule 23. Nonetheless we attempt to reply to the petition on its merits.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. iv-ix) is reported at 388 F.2d 918 and also at 1968 Trade Cases § 72355.

JURISDICTION

Jurisdiction of this Court could be invoked pursuant to 28 U.S.C. 1254(1), but not under 28 U.S.C. 1257 as stated at page 4 of the petition. The judgment of the Court of Appeals was entered January 11, 1968. As the petition was received on April 10, 1968, this brief is timely.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No consitutional provisions or statutes have been set out verbatim, with or without official volume and page citations, in the petition. Selected portions of five sections of the California Business and Professions Code are excerpted and set forth in Appendix II to the petition. In addition there are passing references to the Seventh and Four-

teenth Amendments to the United States Constitution at page 2 of the petition and to the Sherman and Clayton Acts "(15 U.S.C. 1 et seq)" at pages 4, 21, 22 and 23.

It is respondent's view that neither the Constitution nor the statutes mentioned in the petition are involved in the case. This is purely and simply a fact case—not a law case. Both of the lower courts have held that petitioner clearly failed to prove a prima facie case on any of his various theories of action.

If it is assumed that the propriety of the order refusing to remand the case to the state court is a question presented to this Court* (Pet. 13-17), then section 1441 of 28 U.S.C. may be involved in the case. The pertinent text is set forth in Appendix I.

QUESTIONS PRESENTED

Although the questions presented are not identified in the petition, we seem to detect two basic questions in the case as follows:

1. Should the case have been remanded to the Superior Court?

2. Did the plaintiff make a case to go to the jury on his fourth cause of action based upon the federal anti-trust laws?

STATEMENT OF THE CASE

This action was commenced in the Superior Court of the State of California. Defendants, claiming diversity of citizenship, in the first and second causes of action, removed to the United States District Court, Northern Division, Northern District. Plaintiff's motion to remand was denied

*This question was not presented or argued to the Court of Appeals except for one oblique reference in the Appellant's Petition for Rehearing.

after careful consideration by the District Court.* Thereafter, plaintiff was permitted to join a fourth cause of action based upon alleged violations by defendant Anheuser-Busch of the federal anti-trust laws. It would seem clear that after the amended pleading was allowed, all of the causes of action were properly before the court by reason of the pendant jurisdiction doctrine.

Plaintiff's first three causes of action were founded upon state law and sounded in wrongful refusal to deal, breach of contract and unfair competition, respectively. Since their determination presents no federal questions and since the petition does not allege that they were decided in conflict with applicable state law each and all of them seem wholly inappropriate as a ground for certiorari. Accordingly, we do not elaborate the first three causes of action factually here, but turn to the fourth cause of action, which, as has been suggested heretofore, was an afterthought spawned by the adverse decision on plaintiff's motion to remand.

With respect to the fourth cause of action, the proven facts, as contrasted with the elaborate allegations of the complaint, are relatively simple and altogether without significant conflict.

Plaintiff served from October 1, 1961 to May 1, 1963 as defendant Anheuser-Busch's wholesaler in San Joaquin County, California. Over that period, he sold Budweiser and Michelob premium beers along with Hamm's beer, brewed by Theo. Hamm Brewing Co., a popular-priced beer. In early 1963, defendant Anheuser-Busch decided to introduce Busch Bavarian, its popular priced beer, to the California market. Anheuser-Busch, through its Western Division Manager, Vice President John Flanigan, asked plaintiff to

*The unpublished Memorandum opinion of the court is reprinted as Appendix II to this brief.

take on the distribution of Busch Bavarian in San Joaquin County (RT 212-213; 346). Plaintiff demurred—he was unwilling to do so without the permission of the brewers of Hamm's beer (RT 217, 346). From February to April 1963, plaintiff sought permission to take on Busch Bavarian from the Hamm's people. But, like the lady in the proverbial song, they wouldn't say yes and they wouldn't say no (RT 348, 350). Faced with the resultant uncertainty* plaintiff decided not to undertake the distribution of Busch Bavarian beer and so advised Anheuser-Busch on or about April 4, 1963 (RT 360).

During the period of plaintiff's indecision, Anheuser-Busch endeavored to find other distributors in San Joaquin County who would be willing to take on Busch Bavarian beer (RT 227, 354-355). When no existing distributor indicated interest in pioneering this new product in the already highly competitive popular-priced beer market, Anheuser-Busch elected to deal with an inactive distributor, who was willing to undertake the distribution of Busch Bavarian provided that he also got Budweiser and Michelob (RT 688, 690-691). In the face of the economic exigencies of the situation† this arrangement was consummated and Anheuser-Busch ceased dealing with plaintiff.

Thus, Anheuser-Busch changed distributors in San Joaquin County in May 1963. In the process, competition in the sale of beer was intensified by the addition of one new popular-priced brand and one newly activated beer distributor in San Joaquin County, California. It is apparent from a cursory review of the admitted operative facts in

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*Whether his fears were real or fancied, plaintiff worried that he might lose the Hamm's line if he took on Busch Bavarian (RT 353-354).

†Plaintiff candidly testified that no one could make a profit in the Stockton [San Joaquin County] area handling Busch Bavarian alone (RT 354).

this case that they depict no anticompetitive consequences whatsoever. To the contrary, as the Court of Appeals noted in concluding its opinion in this case (Pet. App. ix):

> ". . . A course of conduct which thus increases rather than diminishes competition, benefiting rather than injuring the public, is not condemned under the Sherman or Clayton Acts."

ARGUMENT

There can be no real question about the propriety of the removal of this case to the District Court or the propriety of that court's order denying a remand. Reference to the clerk's transcript at page 14, lines 21-25 shows that the first cause of action (anti-trust) ran only against Anheuser-Busch; the second cause (contract) also charged only Anheuser-Busch (CT 23, lines 23-25) whereas the third count (unfair competition) charged "all defendants" (CT 27, lines 13-15). Since plaintiff was a resident of California and defendant Anheuser-Busch is a Missouri corporation with its principal place of business in St. Louis, Missouri, and the other jurisdictional requirements of the District Court were satisfied, that court had diversity jurisdiction. The cause was removable under 28 U.S.C. 1441(c) which provides in pertinent part:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein. . . ."

The case law on the subject is cited and analyzed in the court's Memorandum and Order denying remand, Appendix II hereof. And, finally, the question was not even raised in the court below.

With regard to the fourth cause of action, the allegations of wrongdoing never ripened into anti-trust violations because the requisite proof was not forthcoming. All that Plaintiff succeeded in showing was that Anheuser-Busch changed distributors in San Joaquin County under the prod of: 1) plaintiff's refusal to take on Busch Bavarian, and 2) economic necessity. The change actually increased, rather than diminished competition and was not an unreasonable restraint of trade. *Ace Beer Distributors, Inc. v. Kohn Inc.*, 318 F.2d 283, cert. den. 375 U.S. 922.

CONCLUSION

If the Court reaches a consideration of the petition on the merits, there is no basis in law for issuance of a writ. It is respectfully submitted that certiorari should be denied.

Dated: May 6, 1968.

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(Appendices Follow)